No. 99-702

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IN THE
Supreme Court of the United States

CAPITAL LEASING OF OHIO, INC.,
Petitioner,

v.

COLUMBUS MUNICIPAL AIRPORT AUTHORITY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN CAR RENTAL ASSOCIATION IN SUPPORT OF PETITIONER CAPITAL LEASING OF OHIO, INC.

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INTEREST OF THE *AMICUS CURIAE*

The American Car Rental Association (ACRA) is a voluntary, non-profit trade association dedicated exclusively to serving the interests of those in the business of renting automobiles.[1] Founded in 1978, ACRA unites its

[1] Counsel for ACRA authored this brief in whole. No one other than ACRA and its members made a monetary contribution to the preparation or submission of this brief. *See* SUP. CT. R. 37.6. The written consents of Petitioner and Respondent have been filed separately with the Clerk of the Court.

members in their commitment to the growth and vitality of the car rental industry by addressing regulatory, legislative, and policy issues of common concern. Today ACRA comprises six of the national car rental companies, including Budget Rent-a-Car Corporation, the licensor of Petitioner Capital Leasing of Ohio, Inc., dba Budget Rent-a-Car of Columbia (Capital). ACRA members account for 55% of car rental revenues and over 50% of the market.

The Columbus Municipal Airport Authority (Port Authority) demands that car rental companies who wish to lease counters in the terminal at Port Columbus International Airport pay a "privilege fee," a percentage of revenues generated from both Airport customers and local customers who never enter the Airport. Capital correctly asserts that this arrangement violates the Equal Protection Clause of the Fourteenth Amendment [2] because it arbitrarily penalizes Capital, who serves both Airport customers and the surrounding community, without furthering any legitimate state interest and contrary to the Port Authority's express statutory authority to charge corporate tenants only for the costs of services the Port Authority provides.

This privilege fee arrangement merits this Court's review because it is particularly invidious in its structure and rationale. The Port Authority demands from business fees in excess of its statutory authority, simply because it enjoys a government monopoly on access to Airport customers. The logic of the Port Authority's position, and of the opinions below, would permit any public authority anywhere in the United States to discriminate however it desired in the fees it charged. Thus the Port Authority's

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2 "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

conduct threatens businesses that contract with public authorities nationwide. Therefore ACRA submits this brief in support of the Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The Port Authority, a governmental entity, is obliged to observe the Equal Protection Clause by not discriminating among similarly situated business partners in ways that bear no rational relationship to any legitimate state interest. The Port Authority's privilege fee discriminates between companies that almost exclusively serve Airport customers from on-Airport facilities and those who serve both Airport and local customers from off-Airport facilities, by penalizing the latter for seeking local revenues. This fee is not rationally related to any legitimate governmental objective. To the contrary, it explicitly contravenes the Port Authority's enabling statute, which permits charges only for the cost of allowing others to use Airport facilities. Having no legitimate purpose, the privilege fee denies Capital equal protection of the laws.

This case has implications beyond the harm Capital suffers. The privilege fee scheme is dangerous precedent, for it tilts the economic playing field upon which car rental companies compete for local customers. Rather than permitting free competition on the normal fronts of price, quality, and service, the privilege fee significantly and arbitrarily raises the cost of serving local customers for car rental companies that serve Airport customers from an off-Airport facility. The privilege fee is analogous to a tying arrangement, in that the Port Authority is using its monopoly over the market for terminal access to Airport customers to extract revenues from the local car rental market. The courts have long recognized the intrinsic harm in such arrangements. If the Port Authority's position prevails, public transportation authorities across

the United States will be free to raise revenues through discriminatory fees levied on any corporate partners they choose. Because the Port Authority's practice departs from established law and presents a substantial question with national economic implications, this Court should grant the Petition for Certiorari.

ARGUMENT

I. THE PORT AUTHORITY'S PRIVILEGE FEE SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE.

A. The Port Authority Through the Privilege Fee Discriminates Against Capital.

Capital is one of several car rental companies that serve Airport customers. Like many of its competitors, Capital leases from the Port Authority a counter in the Airport terminal. It is thus similarly situated to its competitors in the car rental business.

Unlike Capital, the other car rental companies that lease counter space also maintain their fleet facilities on leased Airport property. Thus these companies do not serve local customers from their Airport facilities, as does Capital. But the Port Authority has levied a privilege fee, which it has no power to assess, on a portion of revenues generated from Airport and local customers. Because no car rental company serves the local market as much as Capital, Capital is hurt by the privilege fee like no one else.

The privilege fee imposed by the Port Authority discriminates between the rental companies with fleet facilities on Airport property, who almost exclusively serve Airport customers, and Capital, whose fleet facilities are off Airport property and who serves the broader community. Because Capital must now pay a percentage of

revenues the Airport does nothing to help generate, this economic discrimination heavily disadvantages Capital's ability to compete in the local market.

B. The Privilege Fee Is Arbitrary, Irrational, and Unrelated to Any Legitimate State Interest.

The courts below properly found that the Port Authority is a governmental entity because it contracts with businesses under authority of Ohio law. As such the Port Authority may not discriminate against Capital in violation of the Equal Protection Clause.[3] An economic regulation that discriminates among similarly situated groups violates the Equal Protection Clause if it charges any fee or imposes any condition that is not rationally related to a legitimate state interest.[4]

The law governing the conduct of the Port Authority demonstrates that there can be no legitimate state interest underlying this privilege fee. Under Ohio law government bodies may only charge fees as authorized by statute, and to exceed statutory bounds is to impose an unauthorized tax.[5] The Ohio Supreme Court settled this principle in *Cincinnati v. Roettinger*, where it held that Cincinnati

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[3] *Capital Leasing of Ohio, Inc. v. Columbus Mun. Airport Auth.*, 13 F. Supp. 2d 640, 655 (S.D. Ohio 1998) (citing *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 458 n.5 (1979)), *aff'd*, 182 F.3d 916 (6th Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3310 (U.S. Sept. 16, 1999) (No. 99-702).

[4] *City of New Orleans v Dukes*, 427 U.S. 297, 303-04 (1976).

[5] It is well settled that a charge for services furnished by a municipality to its inhabitants is not a tax, so long as the charge is not in excess of the entire cost of the service. However, where a license fee or a charge for a special service is excessive, or produces excessive funds which are applied to other unrelated uses, then it is deemed a tax, and thus subject to legislative control.

86 OHIO JUR. 3D Taxation § 7 (1988) (citations omitted).

could use the surplus from its water rates only to fund projects specified by statute.[6]

Ohio by statute also explicitly permits the Port Authority to levy fees only in exchange for services the Port Authority provides.

> A port authority may charge, alter, and collect rentals or other charges *for the use or services of any port authority facility* and contract in the manner provided by this section with one or more persons, one or more governmental agencies, or any combination thereof, desiring the use or services of the facility, and fix the terms, conditions, rentals, or other charges for such use or services.[7]

The district court characterized the privilege fee as "similar, if not identical to a space rental charge."[8] But if the Port Authority charges for any service an amount markedly greater than the cost of providing that service, then whatever the charge is called, it is an unauthorized tax.

Nor can the Port Authority legitimately point to any interest that justifies such coercion. Under its previous five-year concession agreements with Capital, the Port Authority leased the rental counter for a nominal fee per square foot plus a portion of its "gross revenues," defined as revenues generated from the counter.

> Gross revenues as used herein shall mean the total amount accruing to Agency by credit of services,

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[6] 137 N.E. 6, 8 (Ohio 1922). *See also City of Wooster v. Graines*, 556 N.E.2d 1163, 1166 (Ohio 1990) (quoting *Roettinger*, holding that rates collected through storm sewer utility may be used for statutory purposes only).

[7] OHIO REV. CODE ANN. § 4582.43 (West 1999) (emphasis added). *See* OHIO REV. CODE ANN. § 4582.31(V) (West 1999).

[8] 13 F. Supp. 2d at 650.

> materials or other merchandising, or from monies received or retained in fees and commissions by Agency from its operations *originating or concluding at the Airport*.[9]

But when it came time to negotiate the 1998 car rental concession agreements, the Port Authority sought to raise revenues by charging car rental companies in excess of the costs of services provided. Under the 1998 concession agreement—to last for ten years—on-Airport car rental concessionaires would pay as a privilege fee a percentage of "gross revenue," redefined to include local revenues.

> Gross Revenue means the total amount charged by any Concessionaire during an Agreement Year including any separately stated fees, surcharges and other charges, in connection with: (i.) Concessionaire's Rental Car Business under this Agreement; (ii.) any activities related directly or indirectly to that business; and (iii.) any other business of Concessionaire in the Operating Areas, in concessionaire's Designated Service Facility, or elsewhere at the Airport.[10]

"Designated Service Facility" included any and all of a company's facilities within two miles of the one facility a company actually designated for on-Airport business. Thus all a concessionaire's revenues from near the Airport would fall within "gross revenue."[11] Capital would be required to pay fees on the 40% of its revenues that it generated independent of the Airport, and thus face

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9 Appellant's Br. 8 (quoting Exh. 11, Section I.C., A.1164) (emphasis added).

10 Petition for Writ of Certiorari, App. H-57 to H-58 (draft Concession Agreement § 4.2.1).

11 *Id.* App. H-23 to H-24 (draft Concession Agreement § 2.2, defining "Designated Service Facility").

greater costs than its competitors in the local market. Capital thus faced a dilemma: if it wanted to avoid the privilege fee, it would have to either discontinue its local business or forfeit its counter—and its Airport customers.

The Port Authority cannot argue that the privilege fee simply covers costs of providing Capital the right to conduct business at the Airport. The 1998 concession agreement clearly indicates that the privilege fee is separate from the costs of providing any service to concessionaires, because it lists the privilege fee separately from the fees directly related to the Port Authority's costs.[12] The Port Authority even sought to hide the privilege fee from the eyes of consumers by prohibiting any reference to the privilege fee as such on consumers' bills.[13]

The Port Authority is empowered to charge rents and fees to cover the costs of services rendered. But the privilege fee by its terms is explicitly unrelated to the cost of any service or benefit the Port Authority provides the car rental companies. Therefore the privilege fee, which discriminates against car rental companies who serve Airport customers from an off-Airport facility, is arbitrary and irrational. Because the courts below have so departed from the usual course of judicial proceedings, this Court should grant the Petition and hear this case.

II. PRIVILEGE FEES COULD HAVE PARTICULARLY INVIDIOUS EFFECTS ON FAIR COMPETITION AMONG BUSINESSES IN THE MARKETS SURROUNDING PUBLICLY OPERATED AIRPORTS NATIONWIDE.

ACRA is concerned not just about Caiptal and the harm it suffers from this discriminatory privilege fee.

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12 *Id.* App. H-54 to H-55 (draft Concession Agreement § 4.1.1.2-4.1.1.6).

13 *Id.* App. H-145 to H-147 (draft Concession Agreement Exh. B Art. 4).

ACRA sees in this case a threat to car rental companies and all other businesses that contract with public airport authorities across this nation.

The larger threat in the Port Authority's action lies in the reasoning behind that action. The Port Authority contends that it may use its government-granted monopoly to charge businesses whatever it desires for access to Airport customers, and even to discriminate in what it charges particular businesses, despite what Ohio law permits it to charge, simply because some businesses will pay. Thus the Port Authority seeks to carve out of the Equal Protection Clause an exception for public airport authorities.

This abuse of power is analogous to a tying arrangement, an agreement by a party to sell one product on the condition that the buyer also purchases a different, or tied, product.[14] Such arrangements are so harmful to competition as to be *per se* unlawful under the antitrust laws.

> They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. . . . They are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected.[15]

While the analogy is not precise, the principle is apt. To allow airport authorities nationwide to levy privilege fees

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[14] *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 6 (1958).

[15] *Id.*

will allow them to condition access to their terminals on payment of profits earned in the unrelated local market. As this Court has observed, such arrangements "serve hardly any purpose beyond the suppression of competition." [16]

Every major airport in the United States enjoys a monopoly on access to airline passengers like the Port Authority's. If the Port Authority prevails here, there is no reason to think that other public authorities will not similarly seek to raise revenues through fees unrelated to the costs of services provided. And if the Port Authority is permitted to discriminate among car rental companies, there is no reason why it could not similarly discriminate among the members of other industries that it contracts with. The rulings below threaten the economic well-being of all those who do business with public transportation authorities across the United States.

The district court and the Sixth Circuit have given their blessing to a capricious form of discriminatory corporate taxation by an essential facility that is a government monopoly. This precedent could disrupt local economies across this nation. Thus this case presents a substantial question for review, and this Court should grant the Petition and review this arbitrary and irrational penalty.

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16 *Id.* (quoting *Standard Oil Co. v. United States*, 337 U.S. 293, 305-306 (1949)).

CONCLUSION

The Port Authority's privilege fee discriminates against Capital for no reason that is rationally related to a legitimate state interest. The danger in tolerating this practice is that other public airport authorities will similarly seek to raise revenues at the expense of free and fair competition in local markets. Therefore this Court should grant the Petition, issue the Writ, and hear this case.

Respectfully submitted,

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